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May 19, 1986

The Honorable John Kromko
Arizona State Representative
State Capitol - House Wing
Phoenix, Arizona 85007

Re: I86-054 (R85-096)

Dear Representative Kromko:

We are writing in response to your request for an opinion on several issues relating to the Attorney General's policy on accrual of annual leave and the employment of Assistant Attorneys General.

Your request arises out of the following background. In 1983 the Legislature amended A.R.S. § 41-771(B) to exempt from the State Personnel System:

> those positions determined by the director [of the Department of Administration] to meet any of the following criteria:
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> . . . .
>
> 3. Persons who provide legal counsel.

Laws 1983, Ch. 98, § 157. However, the Legislature also provided that:

> [t]he provisions of Section 157 of this act do not apply to any person employed prior to the effective date of this act unless the person was exempt from [the personnel system] prior to the effective date of this act.

Laws 1983, Ch. 98, § 238(B).

The next year the Legislature amended A.R.S. § 41-192(B)(3) to provide, in pertinent part, as follows:

> Not later than October 31, 1984, the attorney general shall submit to the joint legislative budget committee a comprehensive performance pay plan for all assistant attorneys general. Notwithstanding the provisions of § 38-611, all monies appropriated for salary adjustments for assistant attorneys general to become effective on or after January 1, 1985 shall be allocated in accordance with the performance pay plan as approved by the joint legislative budget committee. If the joint legislative budget committee does not approve a performance pay plan by December 31, 1984, assistant attorneys general shall receive salary adjustments pursuant to § 38-611.

Laws 1984, Ch. 256, § 1.

On January 28, 1985 the Attorney General adopted an annual leave and sick leave policy for exempt Assistant Attorneys General which allowed them more annual leave than is provided to Assistant Attorneys General covered by the personnel rules for State Service employees. Since the enactment of the amendment to A.R.S. § 41-771(B)(3), the Attorney General has permitted attorneys still covered by the personnel system to "opt out" of the system and be treated as exempt employees, thus accruing more annual leave.

You first ask whether the leave permitted under the Attorney General's annual leave accrual policy for exempt employees constitutes an additional salary or emolument in violation of A.R.S. § 38-601. That section provides that state employees "shall receive the salary provided by law, and shall not, under any pretext, receive any salary or emolument in excess of the salary so provided." You also ask whether the Attorney General's leave policy violates A.R.S. § 41-192(B)(3), quoted above, because it is not part of the performance pay plan submitted to and approved by the Joint Legislative Budget Committee.

The answer to both questions can be found in State v. Boykin, 109 Ariz. 289, 508 P.2d 1151 (1973). In that case, employees of the Department of Public Safety sued the Department and the State for overtime pay for time spent working in excess of an eight-hour day. The salary for Department of Public Safety employees was set pursuant to A.R.S. § 28-235(C)(5) in a manner analogous to the salary plan for assistant attorneys general pursuant to A.R.S. § 41-192(B)(3). A.R.S. § 28-235(C)(5) provided:

> The council shall prepare an annual recommendation to the legislature and joint legislative budget committee of a salary plan and adjustments thereto for employees subject to the jurisdiction of the law enforcement merit system council. Such recommendation shall be made on or before December 1 of each year. The recommendation when completed shall be transmitted to the legislature and joint legislative budget committee through the state personnel commission.

The Court in Boykin decided that overtime pay was not authorized because it had not been approved by the Legislature pursuant to A.R.S. § 28-235(C)(5) and, furthermore, such overtime pay would constitute an excess salary or emolument in violation of A.R.S. § 38-601. The court also held, however, that compensatory time should be granted for overtime work. Such compensatory time would not violate A.R.S. § 38-601 because the term "emolument" included only pecuniary profit and not vacation or compensatory time. 109 Ariz. at 294, 508 P.2d at 1156.

Implicit in the Boykin decision is that paid time-off from work did not have to be approved by the Legislature pursuant to A.R.S. § 28-235(C)(5), since leave is not a salary adjustment. Following the reasoning of State v. Boykin, supra, we conclude that annual leave is neither a salary nor emolument and that the granting of such leave violates neither A.R.S. § 38-601 nor A.R.S. § 41-192(B)(3).

You further ask whether the Attorney General may grant exempt employees more annual leave than is granted for covered employees and, conversely, whether the Attorney General may grant the same annual leave to covered employees as he grants to exempt

employees. These questions can be answered by analyzing the sources of authority to grant leave to exempt and to covered employees.

The Attorney General has the authority to adopt a leave policy for exempt employees. He may employ and assign assistant attorneys general and other employees necessary to perform the functions of the department of law, A.R.S. § 41-192(B)(3), and he is required to establish administrative and operational policies and procedures within his department, A.R.S. § 41-192(A)(2). The establishment of a leave policy is an appropriate administrative function for a public employer. The granting of holiday and vacation rights is a reasonable and proper inducement to competent persons to enter and remain in public employment, to promote their efficiency and morale, and thereby to benefit the public they serve. Adams v. City of Modesto, 53 Cal.2d 833, 3 Cal.Rptr. 561, 350 P.2d 529 (1960).

It is our opinion that the Attorney General has no authority to create a leave policy for covered employees. Leave for covered employees is the exclusive responsibility of the Department of Administration. A.R.S. § 41-763(6) gives the Director of the Department of Administration the authority to issue personnel rules and regulations. A.C.R.R. R2-5-102(B)(1) expressly states that the personnel rules apply to all state service employees. Annual leave is governed by A.C.R.R. R2-5-601(E).[1/]

[1/] The Attorney General and the Department of Administration have entered into an agreement pursuant to A.C.R.R. R2-5-102(M). This agreement delegates responsibility and authority to the Attorney General to fill vacant positions for Special Agent, Legal Research Specialist, and Legal Secretary (Merit System positions). The agreement also provides that the Attorney General shall assume responsibility for filling newly designated exempt positions (Assistant Attorney General positions). This agreement does not permit the Attorney General to adopt a leave policy for covered employees. The agreement specifies, as required by A.C.R.R. R2-5-102(M), that Department of Administration personnel rules will apply to all covered employees.

Thus, the Legislature has authorized both the Attorney General and the Department of Administration to adopt personnel policies, each for a different group of employees. Neither the Attorney General nor the Department of Administration may exercise personnel authority over an employee group governed by the other. Nor is there any requirement that the personnel policies of one be identical to those of the other. In exercising administrative discretion over different groups of employees, it is not unreasonable that different policies will be adopted. We conclude that the Attorney General may grant more leave to exempt employees than the personnel rules grant to covered employees. Moreover, the Attorney General may not permit covered employees to take more leave than is authorized by personnel rules.

Finally, you have asked whether an Assistant Attorney General may "opt out" of the state service and choose exempt status. The answer depends on whether the right to remain in the State Service System may be waived by an employee. Waiver is generally defined as the intentional relinquishment of a known right. See, e.g., Salt River Project Agricultural Improvement and Power District v. Westinghouse Electric Corporation, 143 Ariz. 368, 385, 694 P.2d 198, 215 (1985).

A statutory provision enacted for the benefit of an individual may be waived, so long as there is no public policy forbidding its loss. Holmes v. Graves, 83 Ariz. 174, 178, 318 P.2d 354, 357 (1957). However, if the right is created as a matter of public policy as well as for individual benefit, it cannot be waived. See, e.g., City of Glendale v. Coquat, 46 Ariz. 478, 52 P.2d 1178 (1935) (Waiver of minimum wage law not permitted); Holmes v. Graves, supra. See also Office and Professional Employees International Union, Local 2 v. Washington Metropolitan Area Transit Authority, 552 F.Supp. 622 (D.C. Cir. 1982).

In the case of Assistant Attorneys General, the legislative policy is to exempt lawyers from State Service. The exception to this policy for attorneys already covered does not reflect a public policy favoring coverage for a particular group of attorneys, but rather is an attempt to avoid unfairness to those attorneys previously hired under the State Service system.

The exception is for their own individual benefit, and their coverage may be waived if they believe that exempt status is more advantageous to them.

Sincerely,

BOB CORBIN
Attorney General

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